



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET, SW  
ATLANTA, GEORGIA 30303-3104

December 16, 2020

Mr. Reid Nelson, Director  
Office of Federal Agency Programs  
Advisory Council on Historic Preservation  
Suite 803  
1100 Pennsylvania Ave., NW  
Washington, DC 20004

Dear Mr. Nelson:

On December 16, 2020, the Environmental Protection Agency (EPA) received Chairman Jorjani's signature on the Programmatic Agreement (PA) and an acknowledgment from the Advisory Council on Historic Preservation (ACHP) of EPA's "compliance with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations," related to EPA's approval of Florida's request to assume a Clean Water Act (CWA) Section 404 program. EPA appreciates the ACHP's execution of the PA and confirmation of compliance with the NHPA. EPA, however, strongly disagrees with ACHP's characterization of the nature of the consultation with the Indian tribes.

As detailed below, EPA initiated consultation with the ACHP within a week of receiving a complete package from the State of Florida. Utilizing the U.S. Department of Housing and Urban Development's Tribal Directory Assessment Tool (TDAT), at the recommendation of the ACHP, EPA identified and met individually with each tribe to better understand their specific concerns and then met collectively to discuss the draft PA language. Consultation with the tribes started September 2, 2020, and continued for the duration of our statutory timeframe to consider Florida's request (120 days). During this time, EPA worked with the ACHP and other consulting parties to develop the PA. The final PA incorporated many of the comments made by the tribes, the ACHP, the Florida State Historic Preservation Officer (SHPO), and the Florida Department of Environmental Protection (FDEP), including the inclusion of a stipulation providing for continuing conversations with the tribes about how the PA will be implemented.

### **History of Consultation**

On August 20, 2020, the EPA, Region 4, received a complete package from the State of Florida requesting to assume administration of a CWA Section 404 program per the provisions of Section 404(g)(1) of the CWA. EPA determined that approval of a state program under this provision is a federal undertaking pursuant to NHPA Section 106 and the ACHP implementing regulations at 36 C.F.R. Part 800. Set forth below are the actions EPA has taken to meet the requirements for consultation under the NHPA Section 106 and the ACHP implementing regulations. A more detailed record of EPA's efforts to consult is provided in Enclosure A.

EPA contacted the ACHP in August 2020, regarding Florida's request to assume the CWA Section 404 program. EPA indicated that it deemed approval of Florida's request to be a federal undertaking and that it intended to initiate consultation under NHPA Section 106 and 36 C.F.R. Part 800. EPA discussed with the ACHP its plan to comply with NHPA Section 106 and 36 C.F.R. Part 800 by entering into a programmatic agreement based on the August 6, 2020 Operating Agreement (OA) between the FDEP and the SHPO, and to issue a Federal Register notice inviting public comment on the potential effects of the undertaking on historic properties. EPA provided the ACHP a copy of Florida's request and the OA. EPA and the ACHP also discussed who EPA should consider inviting as consulting parties under NHPA Section 106 and 36 C.F.R. Part 800.

Florida's request to assume the CWA Section 404 program and any potential approval by EPA would exclude Indian country as defined at 18 U.S.C. § 1151, and thus exclude tribal lands as defined at 36 C.F.R. § 800.16(x). As a result, the relevant tribal role in the NHPA Section 106 process for this undertaking is established at NHPA Section 101(d)(6)(B). Based on advice from the ACHP, EPA consulted the TDAT at <https://egis.hud.gov/TDAT/> to identify Indian tribes with interests in Florida. The TDAT listed the following eight federally-recognized Indian tribes as having interests in Florida: the Alabama-Coushatta Tribe of Texas; the Choctaw Nation of Oklahoma; the Coushatta Tribe of Louisiana; the Miccosukee Tribe of Indians of Florida; the Mississippi Band of Choctaw Indians; the Muscogee (Creek) Nation; the Poarch Band of Creek Indians; and the Seminole Tribe of Indians of Florida. EPA subsequently informed the ACHP that it had identified the aforementioned eight tribes and would be sending them invitations to consult on the potential effects of the undertaking, namely approval of Florida's request to assume the CWA Section 404 program. EPA received no suggested modifications to the list of federally-recognized Indian tribes from ACHP or information from the ACHP that would suggest EPA improperly identified the appropriate tribes for consultation.

On September 2, 2020, EPA sent letters to the following 11 parties inviting them to participate in the NHPA Section 106 consultation process regarding EPA's undertaking: ACHP; Florida SHPO; FDEP; the Alabama-Coushatta Tribe of Texas; the Choctaw Nation of Oklahoma; the Coushatta Tribe of Louisiana; the Miccosukee Tribe of Indians of Florida; the Mississippi Band of Choctaw Indians; the Muscogee (Creek) Nation; the Poarch Band of Creek Indians; and the Seminole Tribe of Indians of Florida. The letter to each consulting party identified the nature of the undertaking, EPA's plan to publish notice in the Federal Register of Florida's request and the opportunity for public comment, and an internet link to Florida's submittal to EPA requesting approval to assume the CWA Section 404 program. The letter also requested a response from each party within 30 days if the party was interested in consulting on the undertaking.

Based on advice from the ACHP, EPA reached out to the Florida SHPO for a listing of organizations to contact regarding the undertaking. Per Florida SHPO's recommendation, EPA included the Florida Anthropological Society, the Florida Archaeological Council, and the Florida Trust for Historic Preservation in its interested party email distribution. EPA emailed a letter to these parties that: (1) provided notice of EPA's receipt of the request from Florida; (2) solicited a public review and comment period on the State program which ran for 47 days; (3) announced two public hearings during the comment period; and (4) solicited public review and comment regarding consultation under the NHPA.

On September 16, 2020, EPA provided public notice in the Federal Register of its undertaking, potential impacts associated with the state's issuance of Section 404 permits, its intent to consult with the consulting parties under NHPA Section 106 and 36 CFR Part 800, its plans to consider the OA between FDEP and Florida SHPO as part of the NHPA Section 106 consultation process, and a request for public comment on its undertaking and notice of two virtual public hearings.

On September 22, 2020, EPA held an informational webinar designed to provide the tribes with an overview of the undertaking and the NHPA Section 106 consultation process so that the tribes could make an informed decision about whether they wanted to participate in the consultation process. During the webinar, EPA notified the tribes that it planned to comply with NHPA Section 106 by entering into a PA based on an operating agreement between FDEP and Florida SHPO which would serve as the foundation of the PA. Five of the eight tribes attended the informational webinar: the Alabama-Coushatta Tribe of Texas, the Choctaw Nation of Oklahoma, the Miccosukee Tribe of Indians of Florida, the Mississippi Band of Choctaw Indians, and the Seminole Tribe of Florida. During the webinar, EPA requested that the tribes identify any issues or concerns they had with the OA. As the Poarch Band of Creek Indians was not available to participate in the webinar held on September 22, 2020, EPA hosted a webinar for the Poarch Band of Creek Indians on October 7, 2020.

The following five tribes agreed to participate as consulting parties: Choctaw Nation of Oklahoma; the Miccosukee Tribe of Indians of Florida; the Muscogee (Creek) Nation, the Poarch Band of Creek Indians; and the Seminole Tribe of Florida.

EPA conducted a series of NHPA consultation meetings with the consulting parties on the following dates:

- On September 28, 2020, EPA hosted a consultation call with the Seminole Tribe of Florida as part of the NHPA Section 106 process and EPA's tribal consultation policy.
- On October 1, 2020, EPA hosted a consultation call with the Choctaw Nation of Oklahoma as part of the NHPA Section 106 process.
- On October 7, 2020, EPA hosted a consultation call with the Poarch Band of Creek Indians as part of the NHPA Section 106 process and EPA's tribal consultation policy.
- On October 8, 2020, EPA hosted a consultation call with the Miccosukee Tribe of Indians of Florida as part of the NHPA Section 106 process and EPA's tribal consultation policy.
- On October 15, 2020, EPA hosted a consultation call with the Muscogee (Creek) Nation as part of the NHPA Section 106 process.
- On October 30, 2020, EPA hosted a second consultation call with the Poarch Band of Creek Indians as part of the NHPA Section 106 process and EPA's tribal consultation policy.
- On December 1, 2020, EPA hosted a consultation call with FDEP and Florida SHPO as part of the NHPA Section 106 process regarding EPA's draft PA.
- On December 2, 2020, EPA hosted a consultation call with the consulting parties as part of the NHPA Section 106 process regarding EPA's draft PA.
- On December 3, 2020, EPA hosted a second consultation call with the Miccosukee Tribe of Indians of Florida as part of the NHPA Section 106 process and EPA's tribal consultation policy.
- On December 14, 2020, EPA hosted a final consultation call with all consulting parties as part of the NHPA Section 106 process regarding EPA's draft PA and how EPA addressed

many of the comments received from the consulting parties on the PA. The Poarch Band of Creek Indians accepted the invitation for this consultation call but did not participate.

During the September 22, 2020, informational webinar and during the NHPA Section 106 consultation meetings with the tribes, EPA explained that it planned to comply with NHPA Section 106 by entering into a PA based on the August 6, 2020 OA between FDEP and Florida SHPO, which would serve as the foundation of the PA. EPA provided information about where in the docket the OA could be found and upon request directly emailed documents to the tribes. During the informational webinar and the NHPA Section 106 consultation meetings, EPA encouraged tribes to identify issues, concerns or gaps that they identified with the OA so that EPA could attempt to address those through the PA. EPA considered and responded to all NHPA-related issues raised during these consultation meetings. As a result, the tribes had an opportunity to provide EPA with comments on the OA and issues associated with EPA's undertaking since September 2020.

EPA began negotiating a draft PA with the ACHP on October 21, 2020. EPA and the ACHP reached a tentative agreement on the draft PA language on November 24, 2020. EPA shared the draft PA with the consulting parties on November 25, 2020 and requested comments on the PA by noon December 7, 2020. EPA received, considered, and responded to comments from all the consulting parties and revised the PA to address many of the comments. EPA sent the consulting parties a revised PA on December 10, 2020, and met with the parties on December 14, 2020, to discuss the revisions. On December 16, 2020, EPA sent letters to the other consulting parties with responses to comments received from all consulting parties. Each letter also summarized EPA's communication with the recipient during the consultation process.

### **Programmatic Agreement**

On December 16, 2020, EPA executed a PA with the ACHP, the Florida SHPO, and FDEP. EPA emailed the consulting parties a fully executed copy of the PA on December 16, 2020. A copy of the fully executed PA is included as Enclosure B.

### **Response to Consulting Party Comments**

EPA received numerous comments from the consulting parties during NHPA consultation meetings hosted by EPA and in writing. EPA provided a response to many of these comments during the December 14, 2020 consultation meeting. On December 16, 2020, EPA sent letters to the other consulting parties with responses to comments received from all consulting parties. Each letter also summarized EPA's communication with the recipient during the consultation process. EPA's responses to comments received from the consulting parties, including the ACHP, is provided as Enclosure C to this letter. EPA was able to address many of the comments through the PA.

EPA appreciates the assistance and feedback it received from the ACHP during this process and looks forward to working with you to implement the PA should EPA decide to approve Florida's request to assume the CWA Section 404 program. In the meantime, please contact me at 404-562-8979 or at [gettle.jeanneanne@epa.gov](mailto:gettle.jeanneanne@epa.gov), if you have any questions.

Sincerely,

JEANEANNE GETTLE

Digitally signed by JEANEANNE  
GETTLE  
Date: 2020.12.16 20:28:01 -05'00'

Jeanneanne M. Gettle, Director  
Water Division

Enclosures

- A. Communication with NHPA Section 106 Consulting Parties regarding EPA's Review of Florida's Request for Assumption of a Clean Water Act Section 404 Program
- B. Programmatic Agreement
- C. EPA Responses to Comments from the National Historic Preservation Act Section 106 Consulting Parties on Florida's Request for Assumption

## ENCLOSURE A

### EPA's Communication with NHPA Section 106 Consulting Parties regarding EPA's Review of Florida's Request for Assumption of a Clean Water Act Section 404 Program

#### EPA's Communication with the ACHP

- 8/24/20- EPA letter issued to the ACHP regarding EPA's intent to initiate NHPA 106 consultation, plan for a programmatic agreement (PA) based on the state operating agreement (OA), and plan to issue a Federal Register Notice inviting public comment on EPA's 106 consultation.
- 8/25/20- Call between EPA and ACHP regarding plan for PA based on the state operating agreement, process for identifying interested tribes, and appropriate signatories to the PA.
- 8/25/20- ACHP email to EPA with a link <https://egis.hud.gov/TDAT/> to review for tribes with interests in Florida that would be offered consultation.
- 9/2/20- EPA letter issued to the ACHP inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.
- 9/4/20- EPA email to ACHP providing copies of certain parts of Florida's request for Assumption that related to protection of historic and cultural resources including the OA, EPA-FDEP MOA, Florida 404 Handbook, and a copy of Florida regulations at FL 62-331. This email also identified to ACHP the tribes and other parties EPA was consulting with regarding the undertaking.
- 9/25/20- EPA email to ACHP providing an update that an informational webinar was held for tribes and attached webinar slides. This email included additional information regarding the status of the consultation process, including EPA's communications with the tribes.
- 9/30/20 – ACHP email to EPA acknowledging EPA's September 4 and September 25 emails and the detailed information provided regarding the consultation process EPA was utilizing.
- 10/21/20- EPA email to ACHP providing draft PA for review.
- 10/26/20- Call between EPA and ACHP to discuss draft PA.
- 10/28/20- ACHP email to EPA providing edits to PA.
- 10/29/20- Call between EPA and ACHP to discuss draft PA.
- 11/2/20- ACHP email to EPA providing edits to PA.
- 11/20/20- EPA email to ACHP providing draft PA for ACHP review and comment.
- 11/20/20 - ACHP email to EPA providing edits to PA.
- 11/23/20- Call between EPA and ACHP to discuss draft PA.
- 11/24/20- Call between EPA and ACHP to discuss draft PA.
- 11/25/20- EPA email to consulting parties transmitting draft PA for review and comment.
- 12/2/20- EPA hosted call with consulting parties to discuss draft PA.
- 12/4/20- ACHP letter to EPA providing comments on draft PA.
- 12/10/20- EPA email to consulting parties transmitting revised PA.
- 12/14/20- EPA hosted call with consulting parties to discuss revisions to PA.

#### EPA's Communication with the office of the Florida State Historic Preservation Officer

- 9/2/20 - EPA letter issued to the SHPO inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.
- 9/14/20- SHPO email confirming receipt of 9/2 letter and indicating FL SHPO would want to consult.
- 11/25/20- EPA email to consulting parties transmitting draft PA for review and comment.
- 12/1/20- EPA call with SHPO and FDEP to discuss draft PA.
- 12/2/20- EPA hosted call with consulting parties to discuss draft PA.
- 12/7/20- SHPO letter to EPA providing comments on draft PA.
- 12/10/20- EPA email to consulting parties transmitting revised PA.

- 12/14/20- EPA hosted call with consulting parties to discuss revisions to PA.

#### EPA's Communication with the Florida Department of Environmental Protection

- 9/2/20 - EPA letter issued to the State inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.
- 9/4/20- FDEP email to EPA providing points of contact regarding NHPA consultation.
- 11/25/20- EPA email to consulting parties transmitting draft PA for review and comment.
- 12/1/20- EPA call with SHPO and the State to discuss draft PA.
- 12/2/20- EPA hosted call with consulting parties to discuss draft PA.
- 12/10/20- EPA email to consulting parties transmitting revised PA.
- 12/14/20- EPA hosted call with consulting parties to discuss revisions to PA.

#### EPA's Communication with the Alabama-Coushatta Tribe of Texas

- 9/2/20- EPA letter issued to the Tribe inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.
- 9/15/20- EPA email to 8 tribes with an invitation to an Informational Webinar on 9/22/20.
- 9/22/20- EPA hosted the Informational Webinar.
- 9/22/20- EPA email to 8 tribes providing pdf of Webinar slides.
- 10/19/20- EPA letter issued to Tribe closing consultation due to lack of response.

#### EPA's Communication with the Choctaw Nation of Oklahoma

- 9/2/20- EPA letter issued to the Tribe inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.
- 9/15/20- EPA email to 8 tribes with an invitation to an Informational Webinar on 9/22/20.
- 9/22/20- EPA hosted the Informational Webinar.
- 9/22/20- EPA email to 8 tribes providing pdf of Webinar slides.
- 9/22/20- Tribe issued email asking to be consulting party on NHPA.
- 10/1/20- EPA hosted call to consult on NHPA.
- 11/25/20- EPA email to consulting parties transmitting draft PA for review and comment.
- 12/2/20- NHPA PA call with all consulting parties.
- 12/4/20- Letter from Tribe with comments on draft PA.
- 12/10/20- EPA email to consulting parties transmitting revised PA.
- 12/14/20- EPA hosted call with consulting parties to discuss revisions to PA.

#### EPA's Communication with the Coushatta Tribe of Louisiana

- 9/2/20- EPA letter issued to the Tribe inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.
- 9/15/20- EPA email to 8 tribes with an invitation to an Informational Webinar on 9/22/20.
- 9/22/20- EPA hosted the Informational Webinar (no participation from Tribe).
- 9/22/20- EPA email to 8 tribes providing pdf of Webinar slides.
- 10/19/20- EPA letter issued to Tribe closing consultation due to lack of response.

#### EPA's Communication with the Miccosukee Tribe of Indians of Florida

- 8/31/20- EPA letter issued to the Tribe inviting tribal consultation on FL Assumption.
- 9/2/20- EPA letter issued to the Tribe inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.
- 9/15/20- EPA email to 8 tribes with an invitation to an Informational Webinar on 9/22/20.
- 9/22/20- EPA hosted the Informational Webinar.
- 9/22/20- EPA email to 8 tribes providing pdf of Webinar slides.

- 9/23/20- Tribe call to EPA with notification of their interest to consult under both the broader consultation on EPA's review of Florida's request for assumption and under NHPA.
- 9/23/20- EPA call with the Tribe to schedule consultation, and 10/8/20 was first date available for Tribe.
- 10/8/20- EPA hosted consultation call with the Tribe.
- 10/20/20- EPA email transmitting notes from consultation call on 10/8/20 and requesting feedback.
- 11/20/20- Tribe call to EPA requesting a second consultation call with potential date of 12/2/20.
- 11/24/20- EPA call and email to Tribe to try to schedule second consultation call.
- 11/25/20- EPA email to consulting parties transmitting draft PA for review and comment.
- 11/30/20- Email communication between EPA and the Tribe to schedule a call for 12/3/20.
- 12/2/20- NHPA PA call with all consulting parties.
- 12/3/20- EPA hosted 2<sup>nd</sup> consultation call with the Tribe.
- 12/9/20- Tribe letter issued to EPA transmitting comments on the draft PA.
- 12/10/20- Tribe email requesting a meeting with EPA and the Corps of Engineers.
- 12/10/20- EPA email to consulting parties transmitting revised PA.
- 12/11/20- EPA email transmitting notes from consultation call on 12/3/20 and requesting feedback.
- 12/14/20- EPA letter issued responding to the Tribe's request to meet with the Corps.
- 12/14/20- EPA hosted call with consulting parties to discuss revisions to PA.
- 12/16/20- EPA letter to the Tribe responding to the 12/10/20 email.

#### EPA's Communication with the Mississippi Band of Choctaw Indians

- 9/2/20- EPA letter issued to the Tribe inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.
- 9/15/20- EPA email to 8 tribes with an invitation to an Informational Webinar on 9/22/20.
- 9/22/20- EPA hosted the Informational Webinar.
- 9/22/20- EPA email to 8 tribes providing pdf of Webinar slides.
- 10/19/20- EPA letter issued to Tribe closing consultation due to lack of response.

#### EPA's Communication with the Muscogee (Creek) Nation

- 9/2/20- EPA letter issued to the Tribe inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.
- 9/15/20- EPA email to 8 tribes with an invitation to an Informational Webinar on 9/22/20.
- 9/22/20- EPA hosted the Informational Webinar (no participation from Tribe).
- 9/22/20- EPA email to 8 tribes providing pdf of Webinar slides.
- 10/1/20 – Email from Tribe requesting consultation on NHPA.
- 10/15/20- EPA hosted NHPA consultation call.
- 10/15/20- EPA email to Tribe transmitting Informational Webinar slides and OA
- 10/23/20- EPA email transmitting notes from consultation call.
- 11/2/20- Tribe letter issued to EPA with comments on the State's request for 404 Assumption.
- 11/25/20- EPA email to consulting parties transmitting draft PA for review and comment.
- 12/2/20- NHPA PA call with all consulting parties.
- 12/6/20- Letter from Tribe with comments on draft PA.
- 12/10/20- EPA email to consulting parties transmitting revised PA.
- 12/14/20- EPA hosted call with consulting parties to discuss revisions to PA.

#### EPA Communication with the Poarch Band of Creek Indians

- 8/31/20- EPA letter issued to the Tribe inviting tribal consultation on FL Assumption.
- 9/2/20- EPA letter issued to the Tribe inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.



- 9/15/20- EPA email to 8 tribes with an invitation to an Informational Webinar on 9/22/20.
- 9/22/20- EPA hosted the Informational Webinar. (Tribe unavailable to participate).
- 9/22/20- EPA email to 8 tribes providing pdf of Webinar slides.
- 9/28/20- Tribe call to EPA with notification of their interest to consult.
- 10/7/20- EPA hosted consultation call.
- 10/7/20- EPA email to Tribe providing Informational Webinar slides and copy of OA.
- 10/22/20- EPA email to Tribe providing notes from 10/7/20 consultation call.
- 10/22/20- Email from Tribe requesting additional consultation meeting.
- 10/30/20- EPA hosted second consultation meeting.
- 11/13/20- EPA email to Tribe providing notes from 10/30/20 meeting.
- 11/25/20- EPA email to consulting parties transmitting draft PA for review and comment.
- 12/2/20- NHPA PA call with all consulting parties.
- 12/7/20- Letter from Tribe with comments on draft PA.
- 12/10/20- EPA email to consulting parties transmitting revised PA.
- 12/14/20- EPA hosted call with consulting parties to discuss revisions to PA. (Tribe did not participate)

#### EPA Communication with the Seminole Tribe of Florida

- 8/24/20-Email from an attorney on behalf of the Tribe requesting to consult on FL Assumption.
- 8/31/20- EPA letter issued to the Tribe inviting tribal consultation on FL Assumption with a link to access the documents that comprised Florida's request for Assumption.
- 9/2/20- EPA letter issued to the Tribe inviting them to consult under NHPA Section 106 with a link to access the documents that comprised Florida's request for Assumption.
- 9/3/20- Email from the Tribe with notification of their interest to consult on NHPA Section 106.
- 9/10/20- Email from an attorney on behalf of the Tribe requesting one combined consultation and a video conference to discuss consultation on 9/28/20.
- 9/15/20- EPA email to 8 tribes with an invitation to an Informational Webinar on 9/22/20.
- 9/22/20- EPA hosted the Informational Webinar.
- 9/22/20- EPA email to 8 tribes providing pdf of Webinar slides.
- 9/28/20- EPA hosted consultation meeting with the Tribe.
- 10/7/20- Email from the Tribe transmitting initial comments regarding the OA and PA.
- 10/15/20- EPA email to the Tribe providing notes from the 9/28/20 meeting.
- 11/2/20- Tribe letter issued to EPA with comments on the State's request for 404 Assumption.
- 11/25/20- EPA email to consulting parties transmitting draft PA for review and comment.
- 12/2/20- NHPA PA call with all consulting parties
- 12/7/20- Letter from Tribe with comments on draft PA.
- 12/10/20- EPA email to consulting parties transmitting revised PA.
- 12/14/20- EPA hosted call with consulting parties to discuss revisions to PA.